SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 341

WILLIAM POULOS,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

STATEMENT AS TO JURISDICTION

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No. 4113

STATE

v.

WILLIAM POULOS

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellant files his statement discussing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question pursuant to Rule 12 (1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942.

Opinion Below

The court below wrote an opinion which is reported at 88 Atl. 2d 860. The opinion of the Supreme Court of New Hampshire is made a part hereof, as Appendix A. An earlier opinion answering certified questions in this case appears at 97 N. H. 91, 81 Atl. 2d 312. It is Appendix B.

I

Questions Presented

Is the construction of the laws of New Hampshire and the ordinance in question—so as to completely deny the appellant the right to challenge the federal constitutionality of the ordinance, as enforced, construed and applied in criminal proceedings brought to punish appellant for holding a meeting and giving a speech in the city park of Portsmouth without a permit, which was applied for and illegally denied according to the holdings of the courts below—an abridgment of the rights of appellant to freedom of speech and assembly contrary to the First and Fourteenth Amendments to the Constitution of the United States?

II

Does the punishment of appellant for holding a meeting and speaking in the park without a permit that had been arbitrarily and capriciously denied by the City Council of Portsmouth in violation of the Federal Constitution amount to a construction of the ordinance which is an illegal burden and abridgment of the appellant's rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States?

III

Is the denial of the right to make a defense to the prosecution, charging a violation of the ordinance by failure to have a permit, a violation of the rights to procedural due process of law and a bill of pains and penalties in violation of Article I, Section 10 of, and the Fourteenth Amendment to, the Constitution of the United States?

The first two questions were raised by motion to dismiss in the Superior Court of New Hampshire [3-4] [1]. These

[1] Numbers appearing herein in brackets refer to pages of the printed bill of exceptions filed in the Supreme Court of New Hampshire.

questions were adversely determined by the Supreme Court of New Hampshire. The entire opinion of the Supreme Court of New Hampshire is a part of this statement of jurisdiction. See Appendix A and Appendix B at the end of this statement. By motion for rehearing the third question was raised. The motion was denied.

Statutes Involved

This case draws into question the validity of an ordinance of the City of Portsmouth, New Hampshire, Chapter 24, Article 7, which, among other things, reads as follows:

> Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open air public meeting upon any ground abutting thereon shall be permitted unless a license therefore shall first be obtained from the City Council.
>
> Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open air public meeting.
>
> Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such licensee shall perform or exhibit or such parade, procession, or open air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.
>
> Section 25. Penalty. Any person who violates section 22 of this Article shall be fined Twenty Dollars'' [1].

Constitutional Provisions Involved

Section 10 of Article I of the Constitution of the United States, relied upon in this case, reads as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and Silver Coin a Tender in Payment of Debts;

pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellant relies upon read as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Matters Related to Jurisdiction

Timeliness

The judgment of the Supreme Court of New Hampshire affirming the judgment of the Superior Court was entered April 26, 1952. See Appendix A containing the opinion of the Supreme Court of New Hampshire. A motion for rehearing was filed. It was denied June 3, 1952. The judgment affirming the judgment of the trial court, therefore, became final on June 3, 1952. This appeal is duly presented and filed within the 90-day time limit after the judgment became final. The appeal is timely.

Nature of Case

This is a criminal case. It is an appeal from a judgment affirming a judgment of conviction on an appeal trial

de novo in the Superior Court. The appellant was proceeded against in the Municipal Court of Portsmouth by complaint. He was charged with violating the ordinance in question on July 2, 1950. A companion complaint was made against Derrickson, now deceased. The pertinent part of the complaint charged that Poulos did "on a certain ground abutting a public street, to wit, Islington Street and upon certain ground abutting thereto known as Goodwin Park, did conduct an open air public meeting without having first obtained a license from the City Council so to do" [1-2, 6-7].

How Constitutional Questions Raised

The first two constitutional questions were raised in a motion to dismiss filed in the Superior Court of New Hampshire [3-4, 8-9]. Each question presented in that court was considered and overruled in a written opinion [4-5]. Each holding of the trial court was presented on appeal to the Supreme Court of New Hampshire and duly assigned as error [1-6]. Each federal question presented upon this appeal also was presented to the Supreme Court of New Hampshire in the brief, on oral argument and on the motion for rehearing. See Appendix A and Appendix B of this statement as to jurisdiction.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code or 28 U. S. C. 1257(2).

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Statement of Case

The Proceedings

The appellant pleaded not guilty in the Municipal Court. He was found guilty and fined. He appealed to the Superior Court. On the first hearing before the Superior Court of New Hampshire the case was reserved and at an earlier term transferred to the Supreme Court of New Hampshire. The parties there stipulated the facts. The Supreme Court of New Hampshire held that the ordinance was constitutional because the park was limited in its dedication and permissive use by the City of Portsmouth. See 97 N. H. 91, 81 A. 2d 312.

The case was tried in the Superior Court following the opinion of the Supreme Court of New Hampshire. The appellant pleaded not guilty [3]. A jury trial was waived and the case was tried to the judge alone. At the close of the evidence a motion for judgment of acquittal was made [3-4]. The case was taken under advisement and on December 6, 1951, the court rendered a judgment convicting appellant [4]. A brief memorandum opinion stating the reasons was filed by the court. The judge found that the application for the permit had been arbitrarily and capriciously refused. But he convicted on the ground that it was the duty of appellant to resort to a civil action for mandamus and not defy the law and throw the controversy into the criminal courts. He held that by defiance of the law the appellant forfeited his right to make his defense of unconstitutionality of the enforcement of the law [4-5]. He convicted and fined appellant $20.00 [5].

The Facts

The appellant is a duly ordained minister of the gospel serving the congregation of Jehovah's Witnesses located in the city of Portsmouth, New Hampshire [14, 27]. The con-

gregation is a duly recognized group of Christian people [14-15]. The congregation is essentially evangelistic, composed primarily of missionaries engaged in door-to-door and street distribution of Bibles and Bible literature [14].

In the spring of the year 1950 the congregation, acting through Derrickson, now deceased, and Poulos, made application to the city council of the City of Portsmouth for a license to hold a public meeting in Goodwin Park [27-28]. A written petition was duly addressed to the city council of Portsmouth and filed with the clerk [28]. The appellant and Derrickson were informed that they could appear and speak in behalf of the petition before the city council [28]. The petition was placed on the agenda for hearing May 4, 1950 [28]. On that date Derrickson and Poulos appeared before the city council, Derrickson doing the speaking in behalf of the congregation of Jehovah's Witnesses. The congregation offered to pay any reasonable fee customarily paid for the use of the park as well as any expenses incurred by the city in permitting the holding of the requested meeting. The city council was informed the names of the Bible talks to be delivered and the date, time and place of the proposed assemblies in the park in question. Derrickson showed that the talks related to an explanation of Bible prophecy, showing the cause of the suffering of mankind, the reason for the failure of the governments of this world to bring about a desired peace and the remedy for all the sufferings of mankind, as well as the failure of the governments to bring relief. It was pointed out to the city council that the speeches were designed to prove that Almighty God Jehovah will set up a government of righteousness over the earth that will stand forever and bring peace, prosperity, happiness and everlasting life to men of good will toward him [29, 31-32].

The city council was informed that the assemblies as well

as the speeches proposed to be delivered in the park were to be free of charge and that the public would be freely invited and none excluded [33]. That the series of proposed lectures to the proposed assemblies in the park would show that the people are now living in the "last days" referred to in the Bible and that the great cataclysm of Armageddon is rapidly approaching, from which all honest people desire to find a way of safety and protection [29-32]. It was pointed out that the meetings came within the guarantee of freedom of assembly, freedom of speech and freedom of worship [29-32]. Derrickson read to the city council excerpts from decisions of the Supreme Court of the United States [30].

The petition was denied because the members of the council stated that they had never received a petition of a religious group to use the public parks [31].

Thereafter Jehovah's Witnesses planned to hold their requested series of public meetings in Goodwin Park notwithstanding the refusal of the city council to grant the petition for a license [15, 31]. They selected a spot in the park for assembling and the proposed talk was advertised [15, 31].

On Sunday, June 25, 1950 at three o'clock in the afternoon, Derrickson made his appearance at the park together with a large number of other persons assembled therein to listen to him speak. He had as his title for his public speech "The Pathway to Peace." After being introduced by the chairman he began his talk, which was orderly, without a disturbance. He spoke for about forty-five minutes [31-33].

At 3:45 the speaker was stopped by a police officer of the city of Portsmouth and asked if he had a permit to hold such an open air meeting in the park [32]. Derrickson replied that he had petitioned for a permit but was denied one [32]. Thereupon the policeman left and Derrickson

continued his talk [32]. Shortly thereafter the policeman returned before Derrickson completed his talk and commanded him to discontinue the speech and to disband the congregation, otherwise he would arrest Derrickson. Derrickson refused to do so and continued to speak to the congregation [32]. Then other policemen arrived and took Derrickson to the police station where the warrant and complaint was read to him charging him in the manner above stated [32].

Jehovah's Witnesses planned to hold the second talk of the series of public meetings on Sunday, July 2, 1950. On this date Poulos was selected as the speaker [15]. At three o'clock on that afternoon Poulos made his appearance at the park together with a large number of other persons assembled therein to listen to him speak [15]. He had as title for his public speech "Preserving Godliness Amid World Delinquency". After being introduced he began his talk, which was orderly and without a disturbance [15-16]. He spoke for about fifteen minues [15-19].

At 3:15 Poulos was stopped by a police officer who asked him if he had a permit to hold an open-air meeting in the park and to give the talk [16-18]. Poulos answered that he did not have a permit because the city council had denied the petition for a license and then added that he did not have a permit because it was not necessary [16-18]. The officer informed him that he would have to stop speaking [18]. Poulos informed the officer that he intended to continue [18]. The officer told him that he would be arrested. Poulos continued [18]. He was arrested and transported by automobile to the police headquarters where he was charged by warrant and complaint in the manner above recited [18-19].

The testimony of the councilmen of Portsmouth was uniformly that the city did not have any ordinances or regula-

tions whereby any one park was selected for the purpose of holding religious meetings. They all agreed that there was no type of zoning or selection of the parks for recreation purposes. They all testified that the policy was to deny all applications for permits for religious use on the ground that if they granted a permit for one they would have to give one to all religious organizations. It was admitted that they claimed discretion under the ordinance to refuse religious organizations the use of the parks [20-46].

This testimony of the officials directly contradicted the finding of the Supreme Court of New Hampshire on the reserved case answering the certified questions in advance of the trial in the Superior Court of New Hampshire. 97 N. H. 9, 81 A. 2d 312. There in that opinion the court went out of the record and found a fact that was not in the record and one that did not exist according to the testimony of the councilmen and the clerk of council of the City of Portsmouth.

The Supreme Court of New Hampshire in *State* v. *Derrickson*, in 97 N. H. 91, 81 A. 2d 312, found that the City of Portsmouth had selected Goodwin Park, confined it to recreation and prohibited in it religious assemblies while allowing such assemblies in other parks. This finding was without basis in fact and was made from some mysterious source other than the record. The testimony in the case not only fails to support the finding but it contradicts such finding. The record shows that no park in Portsmouth is set aside and dedicated exclusively for the use of religious assemblies. There are no ordinances or other regulations of the city whereby an effort is made to zone the parks for different types of uses.

The evidence in the case shows that since the inception of the ordinance it has always been the policy to enforce the ordinance so as to deny licenses to all religious organizations. This enforcement of the ordinance presented to the

trial court the identical question that was presented to the Supreme Court of New Hampshire when the reserved case was presented but which was sidestepped by the Supreme Court of New Hampshire through the medium resorted to in its opinion of June 5, 1951. The question presented, stated by the court in its opinion of that date, will be repeated: "Whether a city could prohibit religious meetings in all of its parks is a doubtful question which we need not decide in this case."

The Superior Court, by holding the denial of the application for a permit was arbitrary and capricious, sustained the contention of appellant that the enforcement of the ordinance violated appellant's rights guaranteed by the First Amendment. That court, however, forfeited appellant's defense because he did not apply for a writ of mandamus [4-5]. The Supreme Court of New Hampshire affirmed the holding on authority of *State* v. *Stevens*, 78 N. H. 268. See *State* v. *Poulos*, 88 A. 2d 860. See also Appendix A.

The Questions Are Substantial

The basic question to be determined upon this appeal is whether the defense that an ordinance or statute abridges freedom of assembly and speech contrary to the First Amendment (as enforced, construed and applied by the administrative officials of a town, city or state) can be urged in defense to the prosecution charging appellant with the failure to possess a permit which had been arbitrarily refused to him by the officials. Or, is such defense of unconstitutionality in criminal proceedings charging a failure to have a permit confined to the invalidity of the ordinance on its face?

It was held by the Superior Court that the refusal to grant the requested permit was arbitrary and capricious. On the appeal the Supreme Court of New Hampshire sustained this position. This holding by both courts was tanta-

mount to a holding that the enforcement, construction and application of the ordinance by the officials at Portsmouth was a deprivation of freedoms of speech and assembly contrary to the First and Fourteenth Amendments to the United States Constitution. The courts, however, held that the defense was not available in the criminal proceedings. They held that it was permissible only by way of mandamus proceedings to compel the issuance of the permit.

The decisions of the courts below were a departure from the holding of the Supreme Court of New Hampshire in *State* v. *Cox*, 91 N. H. 137, 16 A. 2d 508, affirmed *Cox* v. *New Hampshire*, 312 U. S. 569. In the *Cox* case, the court in criminal proceedings considered and passed upon the defense whether the enforcement of the state statute, identical to the ordinance in this case, abridged freedoms guaranteed to the appellant by the First Amendment, in that case. That court and the Supreme Court of the United States did not deny the defense but passed upon it. This time the New Hampshire courts depart from the procedure in the *Cox* case and follow the old case of *State* v. *Stevens*, 78 N. H. 268.

The doctrine of the *Stevens* case, while doubtfully permissible in prosecutions for failure to have an administrative permit to perform acts or work not guaranteed by the First Amendment, clearly cannot be enforced to deny the defense where the activity of the appellant, as here, is guaranteed by the First Amendment.

This Court has held that considerations of the sort that would justify an abridgment or denial of a right to carry on other activity are not sufficient to justify the abridgment of liberties secured by the First Amendment. See *Schneider* v. *New Jersey*, 308 U. S. 147, at page 161; *Thornhill* v. *Alabama*, 310 U. S. 88, at pages 95-96.

Cantwell v. *Connecticut*, 310 U. S. 296, controls here. There the Court held that the availability of the writ of mandamus to the Cantwells under Connecticut procedure to

compel the issuance of the permit did not preclude this Court from determining whether the ordinance, as construed and applied, abridged the rights of the appellants in that case. See 310 U. S. at pages 305-307. It is submitted that the decisions below conflict with the *Cantwell* holding by this Court.

The court below attempted to evade the obligations imposed by the Cantwell holding. The court said: "It must be noted, however, that in that case the entire licensing statute was held invalid as it was applied to persons engaged in distributing literature purporting to be religious and soliciting contributions to be used for the publication of such literature. The situation is different from that . . . where the entire statute is not rendered invalid, so that convictions may be had under valid portions."

The court below misapprehended the effect of the holding of this Court in the *Cantwell* case. While the Court said that the statute in *Cantwell* was *invalid as applied* it discloses the belief that certain parts of the statute was held void on its face. This Court held no part of the statute void on its face; the holding of this Court was merely that, as construed and applied to the facts of the case, it was unconstitutional under the First Amendment.

Appellant here made the identical contention that was made in the *Cantwell* case. It is that the ordinance, as construed and applied by the administrative officials at Portsmouth, is an abridgment of liberties guaranteed by the First Amendment. The courts below admit the correctness of this contention, but hurl back upon the appellant their incompetency to determine the question in these proceedings. It is submitted that the present case is not distinguishable from the *Cantwell* case.

The holding of the court below, denying appellant the right to raise his constitutional objections in defense to the prosecution is in direct conflict with *Royall* v. *Virginia*, 116

U. S. 572, 582-584. In that case the licensing tax law was held to be constitutional on its face. As the basis for the denial of the license the administrative official relied on an unconstitutional statute. The same type of holding was made by the Virginia court in that case as was made by the court below in this case. In this case, like the *Royall* case there is a valid law. In this case, like the *Royall* case, there is an arbitrary and capricious denial based on unconstitutional concepts of the law. In the *Royall* case there was a valid statute unconstitutionally construed and applied. In this case there is a valid ordinance unconstitutionally applied. The defendant in the *Royall* case was denied a constitutional right under a valid statute and penalized by having his constitutional defense taken away from him. In this case the court below has forfeited the federally guaranteed constitutional rights and denied appellant the right to make his defense based on the Federal Constitution in the same way that the Virginia court denied Royall his rights. In the *Royall* case the Court said:

> In the present case the plaintiff in error has been prevented from obtaining a license to practice his profession in violation of his rights under the Constitution of the United States. To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States and the law, under the authority of which this is attempted, must on that account and in his case be regarded as null and void (116 U. S. at page 583).

While there is no law of New Hampshire or of Portsmouth which commanded the unconstitutional denial of the permit in this case there was an unwritten policy of the city council that required it. An invalid unwritten policy relied upon by a city council is as much within the reach of the Constitution as is a written law to the same effect. *Niemotko* v. *Maryland*, 340 U. S. 268, at page

271-272. The unwritten unconstitutional policy in th case gives no stronger support to the decision of the cou below than does the written law in the case of *Royall Virginia*, 116 U. S. 572, at page 583. It is submitted th there is a direct conflict between the decision of the cou below and the holding of this Court in the *Royall* case.

The tergiversation of the New Hampshire Supren Court in this case alone ought to be sufficient grounds f the taking of jurisdiction in this case and reversing t judgment of conviction. On the same set of facts disclos in the record in this case, except for the testimony of t councilmen denying the statements made by the Supren Court of New Hampshire in its first opinion, the cou sustained the validity of the law. It considered the d fense of unconstitutionality raised by the appellant the answer to the certified question. See *State* v. *De rickson*, 97 N. H. 91, 81 A. 2d 312. When it was confronte with the inescapable duty of passing on the constitutionali of the administrative action by the Portsmouth city counc on the appeal in this case, it chose to elude the duty i posed on it by the First and Fourteenth Amendments b resurrecting and wrongly applying the doctrine of *Sta* v. *Stevens*, 78 N. H. 268, at page 270. This hedgehoppi of sacred constitutional rights of the people of the Unite States by the Supreme Court of New Hampshire produc a tremendously large area of uncertainty in the field c constitutional law which ought to be extirpated by th Court.

This Court has held that whether a law is valid or i valid under the Constitution "depends on how the statu is construed and applied. It may be valid when given particular application and invalid when given another. (*Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, at pag 545.) The New Hampshire Supreme Court has, to the co trary, erroneously concluded that this Court has limite

the collateral attack against administrative determinations in civil liberties cases to situations where the ordinance providing for the administrative action is void on its face. See the court's discussion in the opinion about the holding in *Hague* v. *C. I. O.*, 307 U. S. 496. See Appendix A, *infra*.

The holding of the court below is that if the laws are constitutional as written by the legislature but are unconstitutional as enforced, construed and applied by the administrative agency, such attack is made collaterally and is one that cannot be considered except in certiorari proceedings brought directly to review.

This position is patently wrong as far as the federally secured liberties of assembly, speech and worship are concerned. This Court has never made a distinction between the unconstitutionality of a statute written by the legislature of a state invalidly upon its face and because of invalidity as enforced, construed and applied by the administrative departments of the state government. In fact, this Court has repeatedly considered collateral attacks against administrative determinations that constitute unconstitutional enforcement, construction and application of legislative enactments.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held that the ordinance providing for the issuance of the permit was perfectly valid as written. The attack was collateral and identical to that made in this case against the ordinance. It was asserted that the ordinance was invalid as enforced, construed and applied by the administrative officers. This Court considered the contention made collaterally against the administrative determination in habeas corpus proceedings brought to review the conviction in a criminal case. This Court has repeatedly considered and held invalid under the Federal Constitution perfectly valid laws as written. The application of the laws was held to be arbitrary, capricious and unconstitutional. The enforce-

ment of them was held to be invalid. See *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 506-508; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 20; *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S. 522, 527, 528, 530, 531; *Sterling* v. *Constantin*, 287 U. S. 378, 393; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434.

The unsoundness of the decision of the court below in this case can be easily demonstrated. That court has limited the attack on constitutional and federal grounds against a law in a criminal case to whether or not the law is invalid as written. The court has emasculated the criminal courts of the state by saying that they do not have as much power as the civil courts. The holding of the court below is such as to put a person confronted with an administrative order in a quandary and predicament.

The decision forces piecemeal litigation. If a person contends that an ordinance is void on its face his remedy is to refuse to comply with it and defend in a prosecution. If the ordinance is said to be invalid as enforced, construed and applied, the only remedy is mandamus or certiorari. Now, is not this an anomalous situation? Does not this make a farce out of litigation? Does it not produce a multiplicity of suits? Does it not split causes of action and grounds of defense? Does it not put a judicial burden and impediment upon the people of the state seeking to exercise their civil liberties?

What could a lawyer do for a client who contends that a law is both unconstitutional on its face and as construed and applied? He, in fairness, ought to be able to make both contentions in one proceeding. The court below, however, has artificially inseminated the law and produced an innovation that forces the lawyer to divide his litigation like an amoeba. Litigation is like the atom; it is dangerous to split. The Supreme Court of New Hampshire has, alas, performed a miracle. It is submitted that this is not the

function of temporal powers, judicial though they may be.

The court below, in attempting to elude *Estep* v. *United States*, 327 U. S. 114, and *Gibson* v. *United States*, 329 U. S. 338, has skated onto thin ice. In simulating a distinction of this case from those two cases, the court below states two grounds. First it says that "Poulos has not exhausted his administrative remedies because of his failure to resort to civil proceedings against the city council"; then it declares that "it was essential for the government to show valid orders of the local boards before it could convict for failure to comply with those orders." This statement follows the observation that it "was not necessary for the State to show the rightful denial of the license." (See the opinion, Appendix A.)

What is the *administrative* remedy that was available to Poulos? Is there a remedy provided in the ordinance? A search shows none. Is there a statutory remedy for review of contentions that a denial of a permit constitutes an unconstitutional enforcement, construction and application of an ordinance? There is no such statutory administrative remedy on the statute books of New Hampshire.

It is indeed a new theory to say that a judicial remedy is an administrative remedy. It has been universally held by the courts, state and federal, that administrative remedies do not include judicial remedies. The remedies of mandamus and certiorari have been held to be judicial remedies and not administrative remedies. The courts have all (except one) held that it was not necessary to resort to one particular judicial remedy to review an administrative determination, unconstitutionally construing and applying a law, before being entitled to make a defense in a criminal proceeding or a collateral attack in an injunction proceeding. See *Lane* v. *Wilson*, 307 U. S. 268; *Railroad & W. Comm'n of Minnesota* v. *Duluth St. Ry.*, 273 U. S. 625. The court below in its opinion stands alone

and ignores the principle of those decisions. This oversight alone is sufficient ground for noting jurisdiction.

The statement that the Government in draft prosecutions is required affirmatively to prove the validity of the order is not true according to federal criminal procedure. The court below says that the Government in draft prosecutions must negative the invalidity of the draft board order. This has never been the holding of any of the federal courts. The court below says that all that need be done in a case where a person holds a meeting after there has been a denial of the permit is to show merely that there has been a denial and the holding of the meeting. In federal draft prosecutions the burden is no greater. All the Government has to do in those prosecutions is to show the registration, the classification, the acceptance, the order to report for induction and the refusal to comply therewith, and case is made out. It is incumbent upon the defendant to point out the invalidity of the order in defense. The appellant sought to do this in the court below. The court, for reasons held invalid in the *Estep* and *Gibson* cases, *supra*, refused to consider the defense that the ordinance was unconstitutional. How it distinguishes the *Estep* and *Gibson* decisions according to the true judicial process does not appear. No distinction can be made. The holdings in those cases control here.

The principle laid down by the court below burdening the exercise of the right to hold a meeting and give a speech in a park with the weighty expense and tiresome wait for a final decision in a mandamus action violates the guaranties of free assembly and free speech guaranteed by the First Amendment.

As long as the would-be preacher is obliged to go to the police station, to wait upon the officer, to sit by until some busy administrator considers a speech that he wishes to make, to wait until the latter has time to determine if a meet-

ing can be or cannot be held, and then wait until a trial and appeal to the Supreme Court of New Hampshire to get a legal opinion upon the issue; then he is denied the free exercise of his liberties. Will the writ of mandamus restore the time lost? Suppose a preacher or politician were traveling through the State making a peripatetic tour speaking on his doctrines but, instead of being at liberty to start speaking in each town, he would first be obliged to deal with the local police and appeal civil proceedings and wait for the judges to act at their pleasure. Would he be free to exercise his right to preach, to lay his oral opinions before the public? Obviously no! For such an activity, liberty would be effectively destroyed, even if in each town the courts were to give the permit. By the time the traveler waited for a decision in each place, he may as well surrender his constitutional rights to the 'village tyrants' and give up the thought of reaching the people in this manner. See *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, at p. 638. Dissemination of information would be effectively hamstrung, strangled and killed in New Hampshire.

Appellant is not obliged to comply with an unauthorized demand before defending a prosecution. Every American citizen has the right to have his case tried by the courts, not by the police.

If the officer does not have the power claimed, then his grant or refusal of the permit would be equally a nullity. Whether he has the power is a living legal issue before the Court. His possible abuse of it is irrelevant.

On this point this Court said in *Thornhill* v. *Alabama*, 310 U. S. 89: "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." See also *Schneider* v. *New Jersey*,

308 U. S. 147, 156-165; *Hague* v. *C. I. O.*, 307 U. S. 496, 516; *Lovell* v. *Griffin*, 303 U. S. 444, 451.

How can appellant be asked to spend time and money asking for a mandamus directed to officials who have defied the Constitution? Before being required to take such an empty procedure, appellant is entitled to have his preliminary question answered: Is this ordinance valid as construed and applied? The basic invalidity of the application and construction of the law immediately ousts the argument that a mandamus must first be sought.

Even assuming that mandamus would lie, it still does not alter the fact that this ordinance as enforced is not only an infringement, but the means of destroying the freedom of assembly and speech from every practical standpoint. Suppose one desires to hold a certain assembly to criticize one of the parties to an election to be held one month hence. The council may refuse to grant the permit. By the time the would-be speaker can get through the courts two or three years may have gone past. Perhaps he has spent all his money getting prepared for the assembly in the first place and does not have the few thousand dollars to spend in litigation; so the right to a free assembly for the poor is entirely abrogated. What the citizen may have to say may be of real value; yet he is prevented from speaking.

Let us assume that one is a poor man with some very important political submission to make to the people. Possibly he has found some great corruption in the police department, the city council or on the part of some other official who is supported and abetted by the city council. The reformer often finds his cause unpopular; one can almost say that the more need there is for a reformation, the greater is the possibility that there will be somewhere a powerful vested interest in the present corruption.

And so the sovereign citizen in all sincerity spends money getting ready to expose these disturbing facts that he has

ascertained. He is told: "Yes, there is free assembly in this country. You may freely state your opinions; but before you can speak or assemble one minute, you must be prepared to take a mandamus against the city council, which before it is finished will most probably cost thousands of dollars." For the rich man this may not be an insuperable obstacle. For the great proportion of the citizens such a view of the law amounts, from a practical standpoint, to a complete prohibition. It is not only the rights of the wealthy and powerful political organizations that must be maintained. The law is no respecter of persons. This Court is just as much concerned with the liberty of the average citizen and the contribution that he can make to the welfare of the nation. The sovereign people are entitled to have their rights protected and not after overcoming the hurdle of huge and disproportionate legal expenses in mandamus proceedings that amount to clear abridgment.

Quite apart from the destroying financial burden of such litigation is the time factor required for the seeking of judicial review of the refusal of the permit. The speaker who wishes to comment upon an election to be held one month hence would not receive much comfort from the assurance that he is entitled to go to court and carry through a couple of appeals before being entitled to present his thoughts to the people. Even suppose he won the case; how much better off would he be with the knowledge that he now has a right to speak and assemble to deal with the outcome of an election that is already a year or two past? This whole argument of the court below makes a farce of the democratic process and totally removes the practical value of liberty of expression.

In times of emergency it is often essential that it be possible to move quickly and immediately to make information known to the people. There are times when the public officials are not too anxious to move on a problem or are afraid

to move. Freedom of the people to agitate for changes may result in something being done before it is too late.

Witness the situation in France during World War II: the country was riddled with fifth columnists, often in high places. It can happen here! If public spirited citizens were at liberty to address the populace, it might be possible to cut out and throw away corruption in office about which much is being said now in election talks or to remove unfaithful officials before it becomes too late. If, however, each of them—the local official or judge—is able to stand athwart the channels of communication, he could prevent the information from reaching the sovereign people before it was too late. In time of invasion, insurrection, corruption in office, pestilence or other serious emergency, it is often essential that the populace have available speedily independent views on the situation separate and apart from the inertia of officialdom.

On the view of the law taken by the New Hampshire Supreme Court and the demand that the officials be permitted to deny the permit subject only to judicial review by mandamus, the value of a free assembly and free speech, from the standpoint of a vital, healthy weapon ready for emergencies and also as something which is open to use by all people, rich and poor alike, would be lost.

It is respectfully submitted that the construction and application of the ordinance and the law of New Hampshire so as to require the appellant to bring a mandamus action or certiorari proceedings in order to preserve his constitutional rights and forfeit his rights to a defense in a criminal proceeding brought to enforce the administrative order denying the permit violate the rights of freedom of speech, assembly and worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

The denial of a defense in this criminal proceeding because the appellant has not sought a writ of mandamus or

certiorari to review an administrative order made the basis of the prosecution is a violation of the Fourteenth Amendment. Reference is again made to *Royall* v. *Virginia*, 116 U. S. 572, where this Court said: "To punish him for practicing it without a license thus withheld is equally a denial of his rights under the Constitution of the United States. . . ." (116 U. S. 583) See also *Thornhill* v. *Alabama*, 310 U. S. 88, at pages 95-98, and cases cited.

In *McVeigh* v. *United States*, 11 Wall. 259, 267, the Court said that when one is assailed by an indictment or proceeding in the United States District Courts, "he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

The doctrine of denial of defenses because of contempt of the law and flouting the orders of administrative and judicial officers has never been approved. In *Hovey* v. *Elliott*, 167 U. S. 409, 413, 414-415, 417-418, this Court reversed a judgment where the answer of the defendant had been stricken because of contempt of court. The Court held that the entry of judgment without affording an opportunity to defend was a violation of the citizen's rights of due process. The right to attack an administrative order on the ground of its illegality, in defense to an indictment, is supported by *Windsor* v. *McVeigh*, 93 U. S. 27, 277-278.

In instances where this precise question has been taken before the appellate courts of some of the other states, it has been held that one proceeded against in a criminal prosecution may show in defense thereto that the administrative determination was illegal, in excess of authority conferred by the statute, arbitrary and capricious, or contrary to the undisputed evidence. *People* v. *McCoy*, 125 Ill. 289, 17 N. E. 786; *Fire Department of City of New York* v. *Gilmour*, 149 N. Y. 453, 44 N. E. 177; *State* v. *Rachshowski*, 86 Conn. 677;

People v. *Kaye*, 212 N. Y. 407, 416; *State* v. *Weimar*, 64 Iowa 243; *State* v. *Kirby*, 120 Iowa 26; *Crane* v. *State*, 5 Okla. Cr. 560; *Richter* v. *State*, 16 Wyo. 437; *Stevens* v. *Casey*, 238 Mass. 368, 117 N. E. 599.

The point made here is demonstrated and supported by the tax assessment cases in New York State. The exclusive remedy prescribed for review of arbitrary and capricious fact and law determinations by tax assessors is certiorari. See Article 13 of the Tax Law of New York. Where the assessors, however, impose taxes upon property exempted by the Constitution and statute, the New York courts recognize that a legal attack can be made collaterally in an action to remove a cloud from the title of the property on the theory that this is an illegal and unconstitutional administrative enforcement of the tax law. See *Elmhurst Fire Co.* v. *City of New York*, 213 N. Y. 87; *People* ex rel. *Erie Railroad Co.* v. *State Tax Commission*, 246 N. Y. 322.

There is no reasonable basis for the denial of the right to be heard in defense to the prosecution. How is the State to be hurt by allowing one charged with speaking in a park without a license permit properly applied for to challenge the constitutionality of the denial? Ultimately it is the same court that decides the matter whether it is by mandamus, certiorari or criminal proceedings. The powers of the criminal court are as broad as the powers of the civil court. It seems highly unreasonable and hyper-technical to hobble the judge of the criminal court and forbid him from doing justice. The present case is a typical example of the absurdity of the procedure established. In the case the court heard the evidence as extensively as it could have been received in a mandamus or certiorari proceeding. Yet the doctrine of *State* v. *Stevens*, 78 N. H. 268, has blinded the court below to justice. What good comes to the procedure of New Hampshire by forcing this conclusion? The burden on the courts is no different whether it be by criminal pro-

ceedings or by civil that the invalidity of the denial is considered.

The reasons against the doctrine of the *Stevens* case are much stronger. The welfare of the people is served best by granting a hearing in a criminal case brought to enforce the order of the administrative agency where there has been no civil review. The citizen is entitled to his day in court, especially in criminal proceedings. It brings criminal proceedings and the courts into disrepute to deny the right of self defense, which is accorded even by the barbarians. Through niceties and the doctrine of convenience the court below has denied just that—appellant's right to self defense.

Such doctrine sets a trap for the unwary. The citizen who attempts to exercise his civil liberties falls through the trapdoor of the doctrine of *State* v. *Stevens*, 78 N. H. 268. While attempting to hold secure his rights, he finds that a gin is set for him by the Supreme Court of New Hampshire in the *Stevens* case, *supra*. It is penalizing to ordinary citizens, many of whom are ignorant of the procedural niceties and technicalities of criminal procedure, to catch them unawares in the insidious *Stevens* doctrine. What does the State profit by such rule? How is the State injured by allowing a defense?

It is respectfully submitted that the holding in this case has denied the appellant his procedural rights in criminal cases guaranteed by the Fourteenth Amendment. For this reason alone the jurisdiction ought to be noted.

The holding of the court below in this case so as to follow *State* v. *Stevens*, 78 N. H. 268, ought to be reversed and the decision in that case set aside because the law of New Hampshire has been construed in such a manner as to deny a judicial trial, thereby converting the law into a bill of attainder, contrary to the provisions of Clause 1, Section 10, Article I of the United States Constitution.

This point was not raised in the trial court. It was not raised in the Supreme Court of New Hampshire until the motion for rehearing was filed. In that motion it was explicitly raised. It is the belief of appellant that, although belatedly raised, it was considered and determined by the Supreme Court of New Hampshire on the denial of the motion for rehearing.

The authorities supporting the contention that the denial of the right to challenge the constitutionality of the ordinance as construed and applied constitutes a bill of pains and penalties are *Cummings* v. *Missouri*, 4 Wall. 277, 320-321; *United States* v. *Lovett*, 328 U. S. 303; *Kentucky* v. *Jones*, 10 Bush (70 Ky.) 725; *In re Yung Sing Hee* (Circuit Court) 36 F. 437 (1888) and *Davis* v. *Berry*, 216 F. 413.

The Decision of the Court Below Is Not Adequate to Support the Judgment on Non-Federal Grounds

This Court is the tribunal to determine whether the non-federal ground is substantial. *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773. The evasive decision by the court below which did not consider the question raised is not conclusive on this Court.

The determination that appellant must first sue for a writ of mandamus instead of exercising his constitutional liberty is a burden and an abridgment of the rights guaranteed by the First Amendment that itself constitutes a federal question: "Where the non-Federal ground is so interwoven with the other as not to be an independent matter . . . our jurisdiction is plain." (*Enterprise Irrigation Dist.* v. *Farmers' Mutual Canal Co.*, 245 U. S. 157, 166.) The doctrine of *State* v. *Stevens*, 78 N. H. 268, was perhaps sufficient for general rights but, when applied, itself became a burden on freedom of speech and assembly under the holding of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, at page 306, and *Near* v. *Minnesota*, 283 U. S. 697.

When the history of the consideration of this question

is considered it is apparent that the Supreme Court of New Hampshire is arbitrarily employing a device to prevent a review of the federal question. On certified questions it found enforcement of the ordinance to be valid under the Federal Constitution because of the unwritten policy of the city council to zone the parks, permitting meetings of a religious nature in some and denying in others. When the question was brought back to it the second time it was evaded because of the failure to apply for a writ of mandamus. It is submitted therefore, that review by this Court cannot be evaded by the Supreme Court of New Hampshire by a non-federal ground "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation District* v. *Farmer's Mutual Canal Co.*, 243 U. S. 147, at page 164. See also *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 22; *Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, 475-476; and *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 282; *Rogers* v. *Alabama*, 192 U. S. 296, 230-231; *Davis* v. *Wechsler*, 263 U. S. 22, 24; and *Brown* v. *Western Railway*, 338 U. S. 294, 299.

Where, as here, a determination by a state court is placed solely upon grounds of state or general law, but a federal claim was timely and properly asserted in the state courts, the failure of the state courts to pass upon the federal question thus asserted is not conclusive upon the Supreme Court of the United States. It will proceed to determine whether the non-federal ground of decision independently and adequately supports the judgment. *Chicago, B. & Q. Ry.* v. *Illinois* ex rel. *Drainage Comm'rs*, 200 U. S. 561, 580; *West Chicago St. R. Co.* v. *Illinois* ex rel. *City of Chicago*, 201 U. S. 506, 519-520; *Wood* v. *Chesborough*, 228 U. S. 672, 676-680.

It is submitted that the procedural basis for the affirm-

ance was not a sufficient non-federal ground to support the judgment below.

Conclusion

The decision of the Supreme Court of New Hampshire, affirming the judgment of the Superior Court, is plainly erroneous on the question of the denial of the right of appellant to make his defense and, because it defies and flouts the holdings of this Court in *Cantwell* v. *Connecticut*, 310 U. S. 296 and *Royall* v. *Virginia*, 116 U. S. 572, the judgment of the Supreme Court of New Hampshire ought to be vacated and the cause remanded to it with directions to consider and determine the constitutional question evaded by it twice, once in 97 N. H. 91, 81 A. 2d 312, and again in 88 A. 2d 860.

In 97 N. H. 91, the court stated the question involved on this appeal to be: "Whether a city could prohibit religious meetings in all of its parks is a doubtful question which we need not decide in this case." The court skipped the question on a false finding, disputed by the testimony of councilmen in the trial of this case, that Portsmouth had zoned its parks, allowing religious meetings in some and prohibiting them in others, including the park in question.

When the court was confronted with the erroneousness of its out-of-the-record finding on the appeal following its answer to the certified questions, the court again dodged the issue by resorting to the device of holding that appellant was estopped now to contest the validity of the ordinance in the criminal proceedings.

It can be seen that the basic question has not been decided, as it was by the Supreme Court of Wisconsin, in *County of Milwaukee* v. *Carter*, 258 Wis. 139, 45 N. W. 2d 90. The Supreme Court of Rhode Island has decided this same question adversely to appellant here. See the opinions in *State* v. *Fowler*, 83 A. 2d 67, and *State* v. *Fowler*, decided August 12, 1952, which appear as Appendix A and Appendix B to

the statement as to jurisdiction filed in *Fowler* v. *State of Rhode Island* in this Court as a companion case to this case. See also the recent decision by this Court in *Zorach* v. *Clauson*, 72 S. Ct. 679. The policy of the city council of Portsmouth not to permit religious talks and meetings to be held in the public parks, held to be arbitrary and capricious by the Superior Court and not determined by the Supreme Court of New Hampshire, conflicts with the two preceding decisions. It is a question that ought to be ultimately determined in this case by this Court. Compare *McCollum* v. *Board of Education*, 333 U. S. 203.

It is, therefore, proper to vacate the judgment and remand the case to the court below as was done in *Musser* v. *Utah*, 333 U. S. 95, so that the Supreme Court of New Hampshire may at last pass on the question that it has escaped so far.

In the event, however, that this Court reaches the conclusion that the judgment ought to be not vacated upon a consideration of the statement as to jurisdiction alone, then the appellant prays that the Court note jurisdiction of this cause for final hearing upon all the questions in accordance with the Rules of the Court, because the court below has disposed of important and substantial federal questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the Supreme Court of the United States, and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for exercise by the Supreme Court of the United States of its power of supervision and review to halt the same.

Respectfully submitted,

HAYDEN C. COVINGTON,
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Brooklyn 2, New York,
Counsel for Appellant.

APPENDIX A

OPINION AS MODIFIED JUNE 3, 1952

Rockingham,
April 26, 1952.

No. 4113

STATE

v.

WILLIAM POULOS & A

Appeals, from the municipal court of Portsmouth. In that court on complaints the two defendants were found guilty of conducting on specified dates without being licensed open air public meetings in Goodwin Park, which abuts Islington Street in the city of Portsmouth. These are the same cases that were transferred by the Superior Court in advance of trial on an agreed stipulation of the facts, and that were reported in 97 N. H. 91. The controlling ordinance is found in chapter 24, article 7 of the ordinances of the city of Portsmouth. It is given in full in the report of the previous transfer.

The two complaints were tried jointly and *de novo* in the Superior Court following the opinion of this court, which opinion held that the ordinance was constitutional as therein stated. The right to jury was waived. It is conceded by the defense that many of the facts, including the lack of licenses, established by the testimony are substantially the same as those stipulated for use at the former transfer. The Court returned verdicts of guilty and filed findings and rulings as follows:

"These cases are appeals from the Portsmouth Municipal Court. The complaints charge the respondents with the violations of Chapter 24, Article 7, section 22, of the Municipal Ordinances of the City of Portsmouth, Section 22 reads as follows:

" 'Sec. 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no

parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the city council.'"

"The respondents admit violations of the ordinance but take the position that the refusal of the Portsmouth City Council to issue licenses to them to speak on religious topics in Goodwin Park, a public park in Portsmouth, was arbitrary and unreasonable and that their constitutional rights of freedom of assembly, freedom of speech and freedom of worship have been violated contrary to the Bill of Rights of the New Hampshire Constitution and the First and Fourteenth Amendments to the Constitution of the United States.

"The constitutionality of the statute, Revised Laws, Chapter 174, sections 2 and 4, by virtue of which the city ordinance was enacted, was settled in the Supreme Court of the United States in Cox vs. New Hampshire, 312 U. S. 569, and cannot now be questioned in these proceedings.

"The respondents could have raised the question of their right to licenses to speak in Goodwin Park by proper civil proceedings in this Court, but they chose to deliberately violate the ordinance.

"Verdict of guilty against both respondents."

The Court imposed a fine of $20 on each defendant.

Exceptions were duly taken to the verdicts and the rulings of the court and a bill of exceptions was allowed both defendants by *Westcott*, J.

It is suggested that since the trial in the Superior Court the defendant Derrickson has died.

Gordon M. Tiffany, Attorney General, and Arthur J. Reinhart, city solicitor, for the State.

Hayden C. Covington (of New York) and Henry M. Fuller (Mr. Covington orally), for the defendants.

JOHNSTON, C. J.:

Since the defendant Derrickson has died pending his appeal, the appeal on his behalf is abated. 24 C.J.S. 381, and cases cited; 96 A.L.R. 1317, 1322.

The Trial Court found that the city council in refusing to

grant licenses to the defendants acted arbitrarily and unreasonably. The latter had offered to pay any reasonable fees customarily paid for the use of the park as well as any expenses incurred by the city in permitting the holding of the requested meetings. However, if the Court was correct that the remedy for such wrongful conduct was in appropriate civil proceedings and not in holding open air meetings in violation of the ordinance, the exceptions of the surviving defendant should be over-ruled. According to the Court, the defendants misconceived their remedy. It has been conceded by the defense on this transfer, as well as on the first one, that the ordinance is valid on its face. It is identical in language with the statute that was construed as valid in *State* v. *Cox*, 91 N. H. 137, which was affirmed in *Cox* v. *New Hampshire*, 312 U. S. 569. It is not disputed that the ordinance applies to the park that was the scene of the open air meetings in question. No objection has been made to the application of the ordinance to the areas where the meetings took place, and no exception taken to any finding or ruling with respect thereto.

We see no reason for overruling the law as stated in this jurisdiction that a wrongful refusal to license is not a bar to a prosecution for acting without a license. "A wrongful refusal of a license is not equivalent to a license. Instead of prosecuting by proper proceedings his claim of right to a license, the defendant chose to disregard the law and must submit to the penalty." *State* v. *Stevens*, 78 N. H. 268, 270. It should be noted that the statutory provision for a penalty in case of a sale by an unlicensed person was held valid, even if a clause of another section with respect to a requirement of residence should be found invalid. This case clearly set forth the procedure to be followed in New Hampshire by one who has wrongfully been denied a license. What was there stated on page 270 applies to the present case. "The defendant had an ample remedy in the writ of certiorari."

The Yale Law Journal in an article on "Res Judicata," v. 49, p. 1266 asserts as follows: "The action of state licensing agencies has uniformly been held to be conclusive against collateral attack. . . . No distinction has been made between errors of fact or of law in the mistaken re-

fusal to grant the license. The same result has been reached even where the denial of a license was based on an unconstitutional section of a statute, provided that the entire statute was not thereby rendered invalid." The writer also cites *State* v. *Stevens, supra,* as authority. See also, *Phoenix Carpet Co.* v. *State,* 118 Ala. 143.

The New Hampshire case of *State* v. *Stevens, supra,* has been cited as authority in the Massachusetts case of *Malden* v. *Flynn,* 318 Mass. 276. On pages 280 and 281 the court there stated: "The invalidity of the rule of the board of health, however, gives the defendant no right to transport garbage through the streets of Malden without a permit in violation of *s.* 31A. *Commonwealth* v. *Blackington,* 24 Pick. 352; *Commonwealth* v. *McCarthy,* 225 Mass. 192; *Commonwealth* v. *Gardner,* 241 Mass. 86; *State* v. *Orr,* 68 Conn. 101; *State* v. *Stevens,* 78 N. H. 268. The defendant was entitled to have his application for a permit considered fairly and impartially by the board and might have maintained a petition for mandamus if the board refused to consider it, . . ."

The same principle of law is clearly stated in *Lipkin* v. *Duffy,* 118 N. J. L. 84, the headnote of which is as follows: "The provision of an ordinance that a license to carry on the business of conducting a junk yard should not be issued to a non-resident is unreasonable and discriminatory, but the remedy is by *mandamus* to compel consideration of the application for a license and not by the conduct of such business in violation of the valid portions of the ordinance without any license whatever."

While 33 Am. Jur. 395 in the article on "Licenses" takes the position that the cases are not unanimous, it uses *State* v. *Stevens, supra,* in support of the following: "According to other cases, however, when a license is refused by the licensing officer, although the applicant has done all that is necessary to entitle him thereto, he has no right to proceed to do the act for which the license is required." 53 C. J. S. 727, in its article on "Licenses" discusses the subject of defenses to criminal proceedings for violation of license laws. The following is stated: "The fact that accused had applied for the requisite license, tendered the fee, and had been refused a license constitutes no defense to a criminal

prosecution for acting without a license unless the license authorities declined to issue a license on the ground that none was required; and it is likewise no defense to show that an application for a license would have been unavailing." As authority for the first proposition, *Commonwealth* v. *McCarthy*, 225 Mass. 192, which was referred to in *Malden* v. *Flynn*, *supra*, is used.

The defense relies heavily on the case of *Cantwell* v. *Connecticut*, 310 U. S. 296, for the proposition that the availability of the writ of *mandamus* under Connecticut law to review the action of the administrative officer in refusing a permit was not sufficient to preclude the court from considering the constitutional defenses. It must be noted, however, that in that case the entire licensing statute was held invalid as it was applied to persons engaged in distributing literature purporting to be religious and soliciting contributions to be used for the publication of such literature. The situation is different from that referred to in the Yale Law Journal, *supra*, and in *State* v. *Stevens*, *supra*, where the entire statute is not rendered invalid, so that convictions may be had under valid portions. Again we call attention to the fact that in this jurisdiction if a licensing statute is constitutional and applies to those seeking a license, the remedy here provided consists of proceedings against the licensing authority that has wrongfully denied the license. The substantial rights of the defendants to licenses are not here refused, but the manner in which they may be exercised must be defined in the licensing proceedings originating before the council. Their remedy was against the City Council of Portsmouth but they chose not to follow it.

Similarly, it was held in *Hague* v. *C.I.O.*, 307 U. S. 496, that municipal officers could be enjoined from action under certain ordinances that violated the constitutional rights of free speech and of assembly. Permits had been refused for public meetings, but, unlike the case at bar, the prosecutions were contemplated under ordinances that were invalid. "We think the court below was right in holding the ordinance quoted in note 1 [relating to public meetings] void upon its face." *p.* 516. Concerning the ordinance dealing with the distribution of printed matter the court said at

page 518: "The ordinance absolutely prohibiting such distribution is void under our decision in *Lovell* v. *Griffin*, *supra*, and petitioners so concede."

In *Estep* v. *United States*, 327 U. S. 114, the court decided that in a proceeding for a violation of the Selective Training and Service Act of 1940 a defendant could show that the order of the local board exceeded the jurisdiction of the board since he had exhausted his administrative remedies. The board had wrongfully denied the defendant an exemption as a minister of religion. It was not necessary to comply with the order and then resort to *habeas corpus* to complete the civil remedies. *Gibson* v. *United States*, 329 U. S. 338, was similar in its facts and holding. In the case before us the defendant Poulos has not taken advantage of an available and proper remedy against the licensing authority. Moreover, he has been prosecuted under a valid ordinance which requires a license before open air public meetings may be held. The State's case was complete upon showing the conduct and the absence of the license. The valid ordinance then governed. It was not necessary for the State to show the rightful denial of the license. In the *Estep* and *Gibson* cases, it was essential for the government to establish the orders of the local boards before it could convict for failure to comply with those orders. These two last mentioned cases are similar to the prosecutions for failure to comply with orders of quarantine issued by health officers cited in the brief for the defense. In such case the order and its validity, if questioned, must be established by the prosecution.

The remedy of the defendant Poulos for any arbitrary and unreasonable conduct of the city council was accordingly in *certiorari* or other appropriate civil proceedings. *American Motorists Ins. Co.* v. *Garage*, 86 N. H. 362, 368.

State v. Derrickson abated; exceptions of defendant Poulos overruled.

All concurred.

APPENDIX B

OPINION

No. 4042

Rockingham,
June 5, 1951.

STATE

v.

ROBERT W. DERRICKSON

STATE

v.

WILLIAM POULOS

Complaints, for conducting open air public meetings in Goodwin Park, which abuts Islington Street in the city of Portsmouth, on the afternoons of Sunday, June 25, 1950 and July 2, 1950, without a permit therefor contrary to the requirements of chapter 24, article 7 of the municipal ordinance of the city of Portsmouth. The ordinance is as follows:

"Section 22. License Required. No theatrical or dramatic representation shall be performed or exhibited and no parade or procession upon any public street or way, and no open air public meeting upon any ground abutting thereon shall be permitted unless a license therefor shall first be obtained from the City Council.

"Section 23. License Form. Every such license shall be in writing and shall specify the day and hour of the permit to perform or exhibit, or of such parade, procession or open air public meeting.

"Section 24. Fee. The fee for such license shall be not more than Three Hundred Dollars for each day such license shall perform or exhibit or such parade, procession, or open air public meeting shall take place, but the fee for a license to exhibit in any hall shall not exceed Fifty Dollars.

"Section 25. Penalty. Any person who violates section 22 of this article shall be fined Twenty Dollars."

Upon appeal *de novo* to the Superior Court from the municipal court of Portsmouth, the defendants before trial moved to dismiss the complaints on the ground that the ordinance as applied was unconstitutional and void. Pursuant to an agreed stipulation of the facts by the parties the question so raised was transferred without ruling by *Goodnow*, C. J.

The congregation of Jehovah's witnesses "acting through the defendants, Derrickson and Poulos, made application to the city council of the City of Portsmouth for a license to hold a public meeting in Goodwin Park. A written petition was duly addressed to the city council of Portsmouth and filed with the clerk. They were informed that they could appear and speak in behalf of the petition before the city council. The petition was placed on the agenda for hearing May 4, 1950. On that date the defendants appeared before the city council, the defendant Derrickson doing the speaking in behalf of the congregation of Jehovah's witnesses. The congregation offered to pay any reasonable fee customarily paid for the use of the park as well as any expenses incurred by the city in permitting the holding of the requested meeting. The defendants gave the names of the Bible talks to be delivered and the date, time and place of the proposed assemblies in the park in question."

After a full hearing before the city Council "the petition of the defendants was denied because the members of the council stated that they had never received a petition of a religious group to use the public parks and they were fearful of creating a disturbance if the application was granted and the assembly held." Thereafter the defendants on Sunday afternoon, June 25, and July 2, 1950, held their meetings without a license. The defendant Derrickson was not allowed to continue after speaking for forty-five minutes and the defendant Poulos was not allowed to continue after speaking about fifteen minutes. No disturbance resulted from the meetings.

Gordon M. Tiffany, Attorney General, *Glenn Davis*, Law

Assistant and *Arthur J. Reinhart*, City Solicitor (*Mr. Tiffany* and *Mr. Reinhart* orally), for the State.

Hayden C. Covington (of New York) and *Henry M. Fuller* (*Mr. Covington* orally), for the defendants.

KENISON, *J.*:

The Bill of Rights of the Constitution of New Hampshire does not guarantee to every individual or to every group of individuals absolute liberty. "When men enter into a state of society, they surrender up some of their natural rights to that society in order to ensure the protection of others; and, without such an equivalent, the surrender is void." N. H. Const. Part First, *Art.* 3rd. The rights of freedom of assembly, speech and worship are accorded a high place in and are specifically guaranteed by the New Hampshire Constitution and statutes implementing it. While these freedoms cannot be prohibited, they may be subjected to reasonable and nondiscriminatory regulation in order that the constitutional rights of others may be equally protected in the interest of public order and convenience.

The ordinance drawn in question in this case is copied from the statute which was construed as valid in *State* v. *Cox*, 91 N. H. 137 and affirmed by a unanimous court in *Cox* v. *New Hampshire*, 312 U. S. 569. The construction placed on the statute in that case (R.L., *c.* 174, *ss.* 2, 4) is the construction that must be given to sections 22 and 24 of the ordinance. "The discretion thus vested in the authority (city council) is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has and the legislature attempted to delegate, no power if did not possess." *State* v. *Cox*, *supra*, 143.

The defendants dismiss the applicability of this case briefly in the following manner: "The *Cox* case is distinguishable here because in this case the respondents have

attempted to comply with the ordinance and offered to pay the necessary fee and expenses." It is doubtful that it makes any critical constitutional difference as to the validity of an ordinance or statute that there was no compliance in one case or attempted compliance in the other. However, we do not pause to examine this contention with any more detail than was advanced in its behalf since the defendants have chosen to place their chief reliance on the recent case of *Niemotko* v. *Maryland*, 340 U. S. 268, which will be hereinafter discussed.

We do not know the number of parks, public commons, public squares and other public grounds in the city of Portsmouth, although it is a matter of public knowledge that Goodwin Park is not the only one in the city (*Sherburne* v. *Portsmouth*, 72 N. H. 539) and that it is a small park. There is nothing to indicate that it has been used for religious meetings or sectarian purposes since it was donated to and dedicated by the city more than a half century ago. See Portsmouth City Reports 1887, page 12; Annual Report City of Portsmouth 1888, page 13; Gurney, Portsmouth Historic and Picturesque 1902, page 64. It cannot be argued that this is a recent discrimination against Jehovah's witnesses since the denial of the park for religious and sectarian meetings is consistent with a definite and systematic policy which treats the Jew, the Catholic, the Protestant and the Jehovah's witness alike.

If the city of Portsmouth wishes to use one of its small parks for other public purposes and to prohibit its use for religious and sectarian meetings in a nondiscriminatory way, constitutional rights are not abridged if there are still adequate places of assembly for those who wish to hold public open air church meetings. If the right to hold a church meeting on public property is to be given a preferred position, it does not necessarily follow that that right can be exercised in every park at any time that a certain group desires to do so. The privilege of people to seek peace and sanctuary in a public park, the privilege to be let alone and the privilege not to be subject to oral aggression of a religious nature on Sunday are entitled to some consideration. If they are allowed to abridge or

unreasonably impair the freedoms of free speech, assembly and worship they are unconstitutional. If such privileges are provided for in a systematic and nondiscriminatory way so that the freedoms of speech, assembly and worship can be adequately exercised within a city the Constitution is no bar to their enforcement.

In the present case we have an ordinance which the defendants have conceded to be valid on its face. The ordinance has been construed by this court and the Supreme Court of the United States in such a way that no discriminatory or unfair abridgment is reasonably possible. This is not a case like *Niemotko* where there was an amorphous, indefinite and nonstatutory policy. In *Niemotko* the applicants were questioned by the city council in a way which clearly indicated prejudice, bias and the consideration of immaterial matters. Those factors are not present in this case. In *Niemotko* the city had previously permitted gatherings by religious groups which is not the case here. In *Niemotko* it was evident there was a previous restraint under an indefinite licensing system which in effect regulated the use of public parks according to the nature of the applicant and the content of his speech. No such attempt is present in this case.

The persistent and perplexing problem of making a reasonable and nondiscriminatory accommodation when fundamental rights collide cannot be solved in a vacuum. The factual situation is therefore extremely important in every case.

The record before us presents an ordinance valid on its face and without any evidence of discrimination in the manner in which it is construed and applied. The defendants have assumed in their argument the question before this court is whether religious meetings can be prohibited in public parks. The issue which this case presents is whether the city of Portsmouth can prohibit religious and church meetings in Goodwin Park on Sundays under a licensing system which treats all religious groups in the same manner. Whether a city could prohibit religious meetings in all of its parks is a doubtful question which we need not decide in this case. What we do decide is

that a city may take one of its small parks and devote it to public and nonreligious purposes under a system which is administered fairly and without bias or discrimination.

No question is presented in this case as to the validity of the fee charged for the use of the park in certain cases. The fee, which is usually nominal and frequently nonexistent, in no event can exceed the reasonable costs of policing the requested meeting.

The fact that some members of the city council thought the granting of a license for a church meeting in Goodwin Park would create a disturbance does not change the result. Although it was an erroneous and insufficient reason for denying the license (*Kunz* v. *New York*, 340 U. S. 290), it has long been the rule in this State that a wrong reason for a correct decision does not invalidate the decision. The main reason for denying the license was the municipal policy of restricting Goodwin Park to nonreligious public purposes and under the factual circumstances of this case was a proper one. See *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 341.

Reliance is also placed on *County of Milwaukee* v. *Carter* (Wis.) 45 N. W. (2d) 90, where an ordinance prohibiting religious services in public parks was held unconstitutional. That case is not in point since it purported "not to regulate but to prohibit speech in public parks on political as well as religious subjects." At this juncture it is important to state that in sustaining the Portsmouth ordinance no reliance is placed on *Davis* v. *Massachusetts*, 167 U.S. 43, which is believed to have been so eroded by the force of time and recent decisions as to be valueless as a binding precedent.

Finally mention should be made of the judicial climate in which the Portsmouth ordinance is to be construed and applied. In their consistent effort to vindicate their civil rights, Jehovah's witnesses have been accorded protection here at times when and under circumstances in which these rights were not protected elsewhere. *State* v. *Lefebvre*, 91 N. H. 382; *Prince* v. *Massachusetts*, 321 U. S. 155; *State* v. *Richardson*, 92 N. H. 178. While they have not been allowed to push free speech to the point of abuse (*State*

v. Chaplinsky, 91 N. H. 310; *Chaplinski* v. *State of New Hampshire*, 315 U. S. 568), limitless discretion, arbitrary action and discriminatory practice on the part of municipal officers have never been allowed against Jehovah's witnesses. There is nothing in the record in this case to raise an inference that Portsmouth is guilty of palpable evasion of the defendants' rights under any guise whatever. On the contrary the city has enforced with respect to one small park an honest, reasonable and nondiscriminatory licensing system which operates fairly on all.

Case discharged.

All concurred.